

Comments AOR 2004-35

September 20, 2004

Lawrence M. Norton, Esq.
General Counsel
Federal Election Commission
999 E Street, NW
Washington, DC 20463

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Re: Comments on AOR 2004-35

Dear Mr. Norton:

Bush-Cheney '04, Inc. ("BC '04") submits these comments on AOR 2004-35. BC '04 supports the requestor's first goal of flexibility in the use of GELAC funds for litigation costs but believes that the Commission must address a number of legal questions to reach this result. It is requestor's second set of questions that this comment will primarily address.

The request poses a number of discreet questions about the application of 2 U.S.C. § 441i(e). BC '04 believes that 2 U.S.C. § 441i(e) does not apply to funds raised and spent for recount or litigation costs that are incurred post-election. While the Commission has received a comment on September 17, 2004 suggesting that 2 U.S.C. § 441i(e) does apply to these funds, BC '04 respectfully submits that Congress did not change the law with respect to recounts and election contests. Recounts and contests are not included in the definition of "election" in 2 U.S.C. § 431(1). As a result, the clause "in connection with an election for Federal office" in 2 U.S.C. § 441i(e) does not apply to recounts and contests.

The comments submitted on September 17, 2004 rely primarily on one of two alternative interpretations of the FECA the General Counsel's Office drafted in November of 2002 that would have constituted Advisory Opinion 2003-38. The requestors of that Advisory Opinion withdrew their request before the Commission had the opportunity to discuss and vote on the two alternatives. Since that time, the Commission has addressed similar issues a number of times, a pertinent fact the comments submitted on September 17, 2004 fail to address.

Commission Advisory Opinions have long held that recounts and other litigation costs such as redistricting and legal defense funds are not subject to the FECA.¹ The

¹ See Advisory Opinions 1978-92 and 1998-26 (recount funds). As early as 1981, the Commission concluded that legal defense funds are not covered by the FECA. See Advisory Opinion 1981-13. The

Commission has continued to adhere to this interpretation of the law post-BCRA. The Commission recently issued Advisory Opinion 2003-15 ("AO 2003-15") which allowed a separate litigation expense fund for the purpose of defending against a lawsuit challenging Georgia's open primary system.

AO 2003-15 provides the Commission's most recent interpretation of the FECA as it relates to federal officeholders. In this opinion, the Commission concluded that the open primary challenge lawsuit was not "in connection with a Federal election" and that, as a result "donations to, and disbursements by, the Fund for the sole purpose of defending against this lawsuit are not subject to the limitations or prohibitions of 2 U.S.C. §§ 441a or 441b." *Id.*

The Commission also determined in AO 2003-15 that 2 U.S.C. § 441i(e)(1)(A) does not change this longstanding interpretation of the FECA. The Commission determined that the members of Congress who voted on BCRA were well aware of legal defense funds and did not intend to change the regulatory regime governing such funds. *Id.*

BC '04 urges the Commission to continue to interpret the FECA consistent with longstanding interpretations of the law relating to recounts and contests.

Sincerely,

/s/

Thomas J. Josefiak
General Counsel

Commission has more recently approved non-federal litigation funds to defend sufficiency of nominating petitions. See Advisory Opinion 1996-39.